SUPREME COURT, U. S.

To be argued by
COPAL MINTZ

Supreme Court, U. S.
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No. 74—363

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA,

Petitioner,

v.

RELIABLE TRANSFER CO., INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF

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Questions Presented

In respondent's view, the questions presented herein are:

1. Do the circumstances of this case require, or render appropriate, reconsideration of the Admiralty Rule of equal division of damages?

2. If so, should the Rule be altered by this Court?

Respondent urges that no is the proper answer to each of those questions.

Contrary to petitioner's contention, respondent believes that above question 1 is properly before this Court. This is discussed at pages 10-14 *infra.*

The Case

(i). Petitioner's statement of the case overlooks critical findings of the trial court which were affirmed by the Court of Appeals.

It was *on those findings* that respondent predicated its cross-appeal to the Court of Appeals and argued—and on the Government's application for certiorari *reiterated in this Court*—that the trial court erred, as a matter of law, in *concluding* (from those findings) that the Coast Guard was chargeable with only 25% of the damage and the vessel with 75%.

We argued that on the basis of the evidence, as summarized by the trial court, the sole maritime responsibility for the grounding of the vessel was the Coast Guard's statutory tort of failing—in this instance, egregiously—to maintain in operating order a crucially important breakwater light.

We argued further that even if it fairly could be concluded that there was some causative contributory negligence in the navigation of *respondent's* vessel, the contributory effect thereof, if any, was minimal and most certainly not more than 25%, the converse of the holding of the courts below.

(ii). At the outset of his memorandum and order (12-24)[1], District Judge Judd of the United States District Court for the Eastern District of New York summarizes the case as follows (12):

> "This admiralty case tried by the court involves the stranding of the tanker Mary A. Whalen on the sand immediately west of the Rockaway Point breakwater light on a windy night in December when the light was

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[1] Numerals in parentheses, when not otherwise indicated, refer to pages of the Government's Petition for Certiorari and its annexes.

not functioning. The vessel was not driven ashore by the wind, but was steered directly toward the light by a captain who believed that he had open sea ahead. He had misjudged his position after a turning maneuver necessitated by the presence of a tug and tow in his previous course. *If the breakwater light had been flashing, he would doubtless have been able to change his course in time to avoid stranding.*" (Emphasis added.)

The Court of Appeals agreed (10):

"The court found, *as common sense would dictate, that if the breakwater light had been operating the captain would not have stranded the vessel.*" (Emphasis added.)

(iii). The facts regarding the non-functioning of the light on the night of December 23, 1968, when the stranding took place, are set forth by the Judge as follows (17):

"The Coast Guard was notified five times in a month, on November 29, and December 1, 9, 18, and 22, 1968, that the breakwater light was not operating. The Coast Guard Manual required that this light, being in a major channel, should be restored to operation within two hours after any report that it was out of operation.

"After each outage was reported, the Coast Guard repaired it within from 2½ to 18 hours * * *."

in contrast to the two hour mandate.

On the night of December 23, obviously, many multiples of two hours had gone by since the light had gone out on the twenty-second.

The trial judge continued:

"* * * On December 27, 1968, after the stranding, the batteries were replaced and the light thereafter burned properly" (18).

* * * * * *

"The Coast Guard did not meet proper standards in its repairs of the Rockaway Point breakwater light. This elevated light, on the lee shore of a relatively narrow marked channel, was an important aid to navigation. This fact was recognized by its designation in the Light List as requiring urgent attention and repair of any discrepancy within two hours" (18; emphasis added).

"A night-time verification of the success of the repairs was essential after routine efforts had proven futile. Such a verification should have resulted in discovery of the need to replace the battery before December 23rd • • •." (18-19).

When lit, that "breakwater light was usually visible for about 4 miles" (14).

(iv). On the night of the accident, December 23, 1968: "The wind • • • was at gale force, approximately 40 to 45 knots from the northwest, with gusts of greater velocity" (13). At the vessel's entry into the inlet, the "tide was at flood • • •, waves were 8 to 10 feet high" (14).

(v). The mishap is described by the trial judge as follows (15):

> [While navigating through the inlet, when the captain of the vessel saw] "a barge ahead off the port side" . . . [he] "continued on his course, intending to pass the barge and turn in front of it. As he started to pass the barge, he obsedved the lights of a tug which was pulling it. Since the tug appeared to be stationary, he decided to continue and cross ahead of the tug. On overtaking the barge, however, he noticed that the tug was speeding up and moving further south. He determined that he could not overtake the tug, and decided to turn around and pass astern of the barge."

In the course of such maneuvering, the captain, the trial judge said (15):

> "saw a dark shadow ahead and asked the deckhand to shine the searchlight on it. The shadow proved to be the Rockaway Point breakwater light structure, about 350 feet in front of him. He turned to the left because there were rocks to the right, and the vessel landed broadside in the sand."

When the Captain made the U-turn he believed that he was south of the breakwater (16). Had that been the fact, he would not have stranded; so the Court found (id.). But actually the vessel was too far north for the turn to be made (16-17). "In other words, [the Captain] did not know where he was when he made the fateful turn" (17).

(vi). In those circumstances, the trial judge concluded —improvidently, we submit—that the captain was at fault because, upon realizing that he could not pass the tug and tow that were ahead, he made a radical change of course without making sure of his position by using the "chart, searchlight, radio-telephone, and radar" with which the vessel was equipped (19-20).

That assumes that the captain should have suspected that he was not where he believed he was—when he had no reason to believe other than that he was heading for the open sea.

The criticism assumes also that in the exigencies of the emergency with which the captain was confronted—including "gale blowing at 45 knots" and "eight to ten foot seas" (19)—he had the time and opportunity to utilize the enumerated facilities.

The criticism assumes further that had the captain engaged in all that investigation, he would have avoided stranding the vessel as well as colliding into the tug or tow.

The criticism ignores the finding that "if the breakwater light had been operating, the captain would not have

stranded the vessel'' (10, affirming the trial judge's holding at 12).

Summary of Respondent's Argument

1. On the facts as set forth by the trial judge (quoted above) and affirmed by the Court of Appeals, the correct conclusion is that the accident is attributable *solely* to the Coast Guard's violation of its statutory duty and egregious negligence. Hence, as in *Union Oil Co.* v. *The San Jacinto,* 409 U.S. 140 (1972), the ''continued vitality of the [equal division] rule in this country'' is not a necessary issue in this case.

2. If the Court reaches consideration of the rule, it should reaffirm it—or refuse to abrogate it—because:

(a) The rule, with its ''major-minor'' corollary, is logical, sound, just, equitable and practical—in any event, far more so that a rule that ''liability . . . shall be in proportion to the degree of the faults respectively committed''.

(b) The existing rule is so integrally embedded in federal admiralty law that Congress is the only appropriate body to determine whether it should be superseded.

I

The quoted findings inexorably lead to the conclusion that the vessel's captain is not chargeable with negligence to any degree.

(i). Directly applicable is this Court's holding in *Casement* v. *Brown,* 148 U.S. 615 (1893). There the defendant had failed to replace a buoy over a submerged pier which was under construction. The defendant urged that collision with the pier was chargeable exclusively to the pilots because, *inter alia,* they were familiar with the area, knew

that construction was in progress, knew the location of the piers, the extent to which work had progressed and that there were partially submerged piers, saw such and yet did not stop or send anyone forward to make inquiries. This Court held at pages 625-6:

> ". . . the fact that, in this case, [the pilots] miscalculated the exact location of the submerged pier does not subject them to the condemnation of negligence."
>
> • • •
>
> ". . . *it would be placing too severe a condemnation on the conduct of the pilots in charge of the boats, to say that their error of judgment, their dependence on the appearance of the stream, and their reliance upon the duty of the defendants to place suitable buoys or other warnings, was such contributory negligence as would relieve the defendants from liability for the results of their almost confessed, and certainly undoubted, negligence.*" (emphasis added)

(ii). Also applicable is the rule that where there is a violation of a statutory rule which is intended to prevent collisions and the like,

> "it is no more than a reasonable presumption that the fault, if not the sole cause, was at least a contributory cause of the disaster. In such a case the burden rests upon the [violator] of showing not merely that [its fault] might not have been one of the causes, or that it probably was not, but that it could not have been one. Such a rule is necessary to enforce obedience to the mandate of the statute".
>
> *The Pennsylvania,* 19 Wall. 125, 136 (1873).

When the violator fails to meet that burden of proof and the

> "fault is, of itself, sufficient to account for the disaster, it is not enough for such vessel to raise a doubt with

> regard to the management of the other vessel. There is some presumption at least adverse to its claim, and any reasonable doubt with regard to the propriety of of the conduct of such other vessel should be resolved in its favor."
>
> *The City of New York,* 147 U.S. 72, 85 (1892).

The foregoing fully applies to the Coast Guard's failure to keep its breakwater light burning.

Thus, the Court of Appeals, in *Merritt, Chapman & Scott Corp.* v. *Cornell Steamship Co.,* 265 F 2d 537 (2d Cir., 1959), in discussing the failure of a vessel to set sufficient lights in violation of 33 U.S.C. 180, stated at page 539:

> ". . . but a different rule applies to the breach of a statutory duty from the breach of an ordinary duty. The doctrine of *The Pennsylvania,* 19 Wall 125, 136, 22 L. Ed. 148, is that when the fault consists in the breach of a 'statutory rule intended to prevent collisions . . . the burden rests upon the ship of showing, not merely that her fault might not have been one of the causes, or that it probably was not, but, that it could not have been' . . . It seems to us impossible to be sure beyond reasonable doubt that if the lights had been visible for 6,000 feet the 'Lion' would nevertheless have failed to act in season, especially when it needed so little added to time to clear the 'ice-breaker'."

(iii). The trial judge's criticism of the captain relates to his execution of the "turning maneuver *necessitated* by the presence of a tug and tow" (12; emphasis added). The maneuver, including the final turn, was perfectly correct—a "normal course" (15)—if the vessel were where the captain believed it to be, with "open sea ahead" (12). In fact, he had not gone as far north as he thought; he was in the immediate vicinity of the inoperative breakwater light

(19). "If the breakwater light had been flashing [the captain], would doubtless have been able to change his course in time to avoid stranding" (12; also 10). It is obvious, too, that had the light been burning, the captain would have known where he was or he would not have been where he was.

Despite that, the trial judge criticized the captain because he did not "turn on the radar . . . did not use his search light . . . did not take a fix on the Rockaway Point Inlet light . . . left his chart in the drawer (15-16). It is not clear whether the criticism is that the captain should have done all that before he had changed his course to avoid the tug and tow (16, 19) or only before making the final turn (15, 19).

Whichever it be, the criticism assumes that the captain should have known or suspected that he was close to the breakwater and had not, as he thought, passed it and was entering the "open sea ahead". There would have been no such mistake and (as both the trial judge and the Court of Appeals found) no accident, had the breakwater light been flashing.

Was the mistake, in those circumstances, both blameworthy and proximate to the stranding, although there would have been neither mistake nor stranding had the light been functioning?

Moreover, with a "gale blowing at 45 knots" and "with eight to ten foot seas" (19) and a tug and tow in his path, how should the captain have piloted the vessel while he engaged in the investigation suggested by the court? Should he have stopped the engines or reversed them or continued on his course? What would have been the result of any of those operations?

The answer to all those questions is that the Coast Guard's proximate violation of its statutory duty eliminates those inquiries.

II

The incorrectness of the conclusion (from the affirmed findings of fact) that petitioner's negligence was 25% is properly before this Court.

(i). Customarily, this Court does not make determinations of law which are not necessary to the proper disposition of a case. That rule is particularly appropriate where, as in this case, the Court is requested to overrule a principle which has been uniformly applied by the federal courts since the founding of the Republic.

Therefore, as recently as 1972, in *Union Oil Company* v. *San Jacinto,* 409 U.S. 140, where, as here, certiorari was granted to review the equal division rule, this Court subsequently abstained from ruling on the point when, upon a full consideration of the record, it came to the conclusion that only one of the parties had been at fault.

(ii). Overlooking that pertinent precedent, petitioner (in a footnote at pp. 2-3 of its brief)—citing *Morley Construction Co.* v. *Maryland Casualty Co.,* 300 U.S. 185, 191 (1937)—argues that "no issue concerning the parties' relative fault is properly before the Court," because, "the Government chose not to petition on this basis" and respondent did not cross-petition. In the *Morley* case, in an appeal by a defendant from a judgment against it, the Court of Appeals, although the plaintiff had not cross-appealed, remanded the case to the trial court to fashion a very different judgment for the plaintiff, both "in substance and in form . . . the facts being found anew and differently, the law declared anew and differently, and the relief remodelled and adapted to the new law and the new facts" (at page 191). Because such relief in favor of the plaintiff-appellee was not encompassed by the defendant's appeal, this Court reversed the decree of the Court of Appeals and remanded the case to that court "to pass upon the question, not yet definitively answered, whether relief in

the form of a decree" which had been prayed for, "is proper in the circumstances, and for other proceedings in accordance with this [Court's] opinion."

That holding, we submit, has no application to this case because the plaintiff in this case did cross-appeal in the Court of Appeals and sought judgment for the full amount of the damage. The certiorari which this Court has granted in this case, we believe, brings up for review the intrinsic correctness of the affirmance by the Court of Appeals, regardless of who petitioned for review—at least to the extent of determining whether the question which motivated the grant of review is necessarily presented by the case.

In that connection it is important to take into account that the plaintiff had no right of appeal to this Court. A petition for certiorari solely to review the correctness of the 25%-75% apportionment of fault—not the equal division rule—would have flaunted this Court's Rule 19. When the government petitioned solely on the ground that the equal division rule is an anachronism whose abandonment is long overdue, plaintiff responded that this case is not appropriate for the reconsideration of the rule because, as in the *Union Oil* case, *the petitioner was solely at fault,* the contrary conclusion by the courts below being contrary to their findings of fact. That issue having been thus raised with a specific reference to the *Union Oil case,* is not the question whether petitioner was solely at fault (or at fault not less than 50%) inherently a *preliminary* or threshold issue the determination of which is *prerequisite* to reconsideration in this case of the equal division rule?

In the *Union Oil* case, although certiorari was granted "principally to consider petitioner's request that [this Court] abandon the divided damage rule . . . orderly disposition of the issues presented by the petition" was held to require consideration of the issue of liability before reaching the question of damages" (at p. 141; emphasis added).

This Court concluded (at p. 146):

> "Since in our view respondents alone were at fault there is no occasion to consider how damages should be apportioned were both vessels at fault."

If in that case this Court had determined that the petitioner alone was at fault—rather than the respondent—would it have ignored that fact and determined whether the equal division rule should be abrogated?

Although not cited by petitioner, we do not overlook the holding in *Cooper Stevedoring Co., Inc.* v. *Fritz Hopske Inc.*, 417 U.S. 106 (May 1974), in footnote 4 (at p. 109), that the respondent by not having filed a petition for certiorari barred itself from urging that it was entitled to full indemnity from the petitioner rather than the half that had been awarded. There, however, as we understand the case, the respondent's position rested on a claim (which the courts below had rejected) of a breach by petitioner of a contract provision; thereby respondent sought to raise an issue *distinct from the issue* for which petitioner was granted certiorari, namely whether the admiralty equal division rule applied to liabilities created by statute. Here, however, respondent does not raise an issue extraneous to the admiralty rule which petitioner desires to be rescinded.

(iii). The government argues further that consideration of whether this is an appropriate case for the reconsideration of the equal division rule "is foreclosed" by the rule that an affirmed finding is not reviewable by this Court in the absence of "a very obvious and exceptional showing of error" (citing *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275 (1949) and *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635, 1967).

Respondent's answer to that is two fold.

First and foremost, respondent is not seeking a reversal of a finding of fact. The determination that respondent's fault was 75% and petitioner's fault 25%, is not a finding

of fact; it is a conclusion from the evidentiary findings; and it is respondent's submission that the affirmed findings —"If the breakwater light had been operating the Captain would not have stranded the vessel" and that the light was not operating because of egregious negligence by the Coast Guard—inexorably dictate the conclusion that responsibility for the damage rests solely on the Coast Guard.

Secondly, we submit, if the apportionment be deemed a finding of fact, the error thereof is indeed "very obvious and exceptional".

(iv). Petitioner argues further that the Government is not liable for the Coast Guard's negligence because its duty is not "affirmatively to guide the mariner, but only the duty not to mislead him," whereas here, the Government's brief says, the knowledge that the light was not operating "negates any reliance".

Indian Towing Co. v. *United States,* 350 U.S. 61 (1955), is cited in support of that argument. *That case, however,* is *contra:*

> "The Coast Guard need not undertake the lighthouse service. But once it exercised its discretion to operate a light on Chandeleur Island and engendered reliance on the guidance afforded by the light, it was obligated to use due care to make certain that the light was kept in good working order; and, if the light did become extinguished, then the Coast Guard was further obligated to use due care to discover this fact and to repair the light or give warning that it was not functioning. If the Coast Guard failed in its duty and damage was thereby caused to petitioners, the United States is liable under the Tort Claims Act."

In the face of that holding, strange indeed is the petitioner's suggestion that the purpose of the Rockaway Point breakwater light was "not to guide the mariner but only . . . not to mislead him".

Stranger still is that contention in the face of the following admission in the Government's Answer (Appendix at p. 13):

> "Defendant, United States of America, . . .
>
> . . .
>
> "4. . . . admits that at the southerly end of the rock jetty at Rockaway Point, on the western end of the Rockaway Peninsula, in the Borough of Queens, City of New York, *a navigational light was maintained as an aid to navigation* by the United States Coast Guard, an agency of the United States, pursuant to authority vested in it by Chapter 5 of Title 14, U.S.C.A." (emphasis added).

III

The equal division rule, with its "major-minor" corollary, is logical, sound, just, equitable and practical—in any event, far more so than the urged substitute.

(i) The history of the equal division rule was fully known to this Court in 1882 when it decided the case of *The North Star,* 106 U. S. 17. That history is set forth therein at pages 21 *et seq.* A supplement thereto is contained in *The Max Morris,* 137 U. S. 1 (1890) at pp. 8-14.

In *The North Star,* the Court traced the lineage of the rule, its adoption by this Court in *Catherine* v. *Dickinson,* 17 How. 58 U. S.) 169 (1854) and its reiteration in subsequent cases. In point of fact, the rule had been adopted by this Court some years earlier in *Strout* v. *Foster,* 1 How. (42 U. S.) 89 (1843).

In 1890, the rule was again thoroughly reviewed in *The Max Morris, supra.* The opinion in that case notes 22 decisions by this Court in which the rule had been applied and extended (at pp. 8-11). It referred to and re-

viewed other cases (at pp. 12-14). Those cases, the opinion said, "show an amelioration of the common law rule, and an extension of admiralty rule in a direction which we think is manifestly just and proper" (at p. 14).

Since then, the equal division rule was reaffirmed and applied by this Court in *The Chattahoochee,* 173 U. S. 540 (1899); *The Eugene Moran,* 212 U. S. 466 (1909); *Weyerhauser Steamship Co.* v. *United States,* 372 U. S. 597, 603 (1963); *White Oak Transportation Co.* v. *Boston Canal Company,* 258 U. S. 341 (1922); *Cooper Stevedoring Co.* v. *Kopke Inc., supra,* 417 U. S. 106 (May 1974).

In the last mentioned case, this Court (at p. 110) took note of the "admiralty doctrine" of equal division of damages in cases of concurrent contributory fault and its "ancient lineage" dating back to "the 12th century". The rule, this Court observed, "has over the years been liberally extended" and (at pp. 110-111):

> "Indeed, it is fair to say that application of the rule of division of damages between joint tortfeasors in admiralty cases has been as broad as its underlying rationales. The interests of safety dictate that where two parties 'are both at fault they should bear the damage equally, to make them more careful.'
>
> *The Alabama, supra,* at 697."

We do not overlook that in a footnote (at p. 108), the Court noted that since the District Court had found the parties equally at fault there was "no occasion in this case to determine whether contribution in cases such as this should be based on an equal division of damages or should be relatively apportioned in accordance with the degree of the fault of the parties".

That explanatory observation or limitation, it seems to us, does not weaken the above quoted endorsement of the

historical adherence to and extension of the rule of equal liability for concurrent proximate causative fault, regardless of degree.

(ii) As recently as 1974, as pointed out at page 15, *supra*, in *Cooper Stevedoring* v. *Kopke, supra,* the "underlying rationales" of the existing rule were approved and this court said:

> "The interests of safety dictate that where two parties 'are both at fault they should bear the damage equally, to make them more careful.'"

Another rationale is the fairness and logic that where two (or more) parties have been causatively at fault, the *relative degree* of the parties' fault is *irrelevant* where the accident would not have occurred in the absence of either party's fault.

In those circumstances, the accident logically is equally attributable to both (or all) parties regardless of their respective degrees of fault—the more or less (whether 25% or less or 50% or more) in such cases is devoid of realistic consequence since without such fault (whatever its relative degree) the accident would not have occurred. Where the causation thus is joint, of what consequence are the exact proportions? Each party can truthfully say to the other: "If it were not for your negligence, the accident would not have occurred." That being the fact, is it not just and equitable that the consequent loss be borne equally regardless of the degrees of respective fault?

It may be speculated that it was such analysis and appraisal that resulted, at common law, in the rule that all whose negligence contributed to an accident are fully responsible to third parties injured by them but they *could not recover from each other* regardless of relative blame. There is logic in that point of view—so pervasive that it, too, has continued for centuries.

But that logic is stern and severe and works manifest injustice in situations where one of the negligent parties suffers no loss and the other suffers a heavy loss; the former escapes consequence for the mutually caused loss or damage and the latter suffers heavily even though the accident would not have happened in the absence of the former's negligence.

Admiralty, with more perception and less rigidity, conceived that in such circumstances, rather than denial of recovery to either of the mutual tortfeasors, it is more equitable and just to hold each party equally responsible to the other where the accident would not have occurred in the absence of negligence by both (or all where more than two), and, as at common law, both (or all) be held fully responsible to third parties.

Both rules, it should be noted, exclude the notion that greater equity would be achieved between mutual tortfeasors by pro-rating the damages on the basis of respective degrees of fault where (whatever the degree) there would have been no accident without it.

Moreover, such apportionment of causative fault on a percentage basis assumes a non-existent mathematical capability—a capability which the trial judge in this case acknowledged he did not possess when he said (20): "Allocation of proportionate fault is not capable of mathematical certainty, but the court's judgment is * * *."

Realistically, can a judge responsibly say 25% rather than 20% or 15% or rather than 30% or 35%? And should a trial court's percentage guess be protected, by the "unless clearly erroneous" rule which the Court of Appeals applied (10)?

The present rule is relatively simple and certain. The inquiry is limited to ascertaining, who, according to the evidence, is chargeable with significant contribution to the accident. An additional duty to assign percentages to

respective responsibility may be likened to requiring a pathologist who finds several concurrent proximate causes of death to say, with a reasonable degree of certainty, which among them was more causative than the other or others and the percentage degrees of difference.

(ii). The facts that the rule (a) is of ancient lineage (b), was adopted by the courts in this country from the time they commenced functioning (c), had been and was the law in Britain for many years before 1824 when it was officially recognized by the House of Lords (*Hay* v. *Le Neve,* Scots Appeals, Vol. 2, p. 395) (d) was adopted by this Court in 1843 (e), was reiterated in 1854 and (f) again in 1882 with an extensive review of the history and operation of the rule and (g) again thoroughly considered in 1890 and (h) since then has been extended by this Court as maritime liability successively was enlarged by acts of Congress—all these certainly are not arguments or considerations for the plenary abrogation of the rule by this Court.

Respect for the ancient and perennial, in our jurisprudence as in other phases of life, currently may not be as compelling as in other eras; nevertheless deliberative and deliberated change of a long established and consistently followed rule of law is not to be made because it does not prevail in other countries or because the rule is not to the liking of those who take a different view of what, in given circumstances, may seem more logical or more equitable.

That the equal division rule has been criticized by some eminent jurists and commentators, we respectfully suggest, is not persuasive. Dissent by judges, as well as lawyers and scholars, in regard to rules of law and their application, is not uncommon; and the views of the most eminent are not necessarily the sounder or the soundest.

More persuasive, we suggest, is the fact that the authors of the International Convention to which petitioner refers,

deemed it necessary to incorporate a provision that where "it is not possible to establish the degree of the respective faults", the "liability shall be apportioned equally". That is a recognition of the difficulty of attempting a mathematical apportionment of blame in any case of substantial concurrency of causation.

Still more persuasive is the fact that in the 64 years since the promulgation of that convention, Congress has failed to ratify it. Congress has not been reluctant to change maritime rules where it deemed change in the public interest. Its failure to act on the International Convention signifies at least grave doubt that the abandonment of the rule of equal division will promote justice. In the light of the abstention by Congress, the fact that other countries have adopted the convention is not a reason for this Court to set aside a rule which so long has continued to have the Court's endorsement.

IV

Congress, as the law making body, is the more, if not only, appropriate branch of government to determine whether the organic change petitioner seeks should be made.

Whether a rule of law fashioned by the courts, when met with substantial criticism and which has undergone change in other jurisdictions, should be altered by the courts or should await legislative action, is a much mooted question. Judicial amendment may be appropriate in areas of law in which there has been no legislative intervention. It is not appropriate, we submit, in areas in which Congress has legislated extensively.

In addition, especially inappropriate is the petitioned judicial amendment, since the proposal has been before Congress and Congress, after extensive hearing and debate,

has seen fit not to enact the propagandized change. In those circumstances, for the Court to adopt a change in law which Congress has seen fit to leave unchanged, would be especially inappropriate. Should the Court by a decision, after hearing only the two parties in a lawsuit, do what Congress has refused or abstained to do during the past 64 years after extensive hearing of all affected parties—either by Senate ratification of the Brussels Convention or by legislation?

Manifestly, the legislative process can hear and weigh the views of representatives of all who may be affected; and it is Congress, as the elected representative of the people, in whom the Constitution vests the primary power to make laws.

What was said by this Court in 1952 remains fully applicable:

> "We have concluded that it would be unwise to attempt to fashion new judicial rules of contribution and that the solution of this problem should await congressional action. Congress has already enacted much legislation in the area of maritime personal injuries. . . . The legislative process is peculiarly adapted to determine which of the many possible solutions to this problem would be most beneficial in the long run. A legislative inquiry might show that neither carriers, shippers, employees, nor casualty insurance companies desire such a change to be made. The record before us is silent as to the wishes of employees, carriers, and shippers; it only shows that the Halcyon Line is in favor of such a change in order to relieve itself of a part of its burden in this particular lawsuit."
>
> *Halcyon Lines* v. *Haenn Ship, Ceiling & Refitting Corp.*, 342 U.S. 282, 285-6 (1952).

Similarly, in *N. M. Patterson & Sons, Ltd.* v. *City of Chicago,* 324 F. 2d 254 (7th Cir. 1963), the court said (at pp. 257-8):

> "The claimed shortcoming of the rule are features inherent in it and have always coexisted with it. We are aware of no change in the nature or circumstances of the subject matter of its application which would justify its judicial rejection, or its restriction to mutual but equal fault cases, on the basis that it no longer serves to accomplish its original purpose. In our opinion the substitution of any alternative rule is a matter for congressional rather than judicial determination."

CONCLUSION

It is respectfully submitted that the case should be remanded with instructions to direct the increase of the judgment in favor of the plaintiff to the full amount of the plaintiff's damages, $108,446.66.

Respectfully submitted,

COPAL MINTZ
HERBERT B. HALBERG
Counsel for Respondent

February 14, 1975.

(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

UNITED STATES *v.* RELIABLE TRANSFER CO., INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 74–363. Argued March 19, 1975—Decided May 19, 1975

The admiralty rule of divided damages, whereby the property damage in a maritime collision or stranding is equally divided whenever two or more parties involved are found to be guilty of contributory fault, regardless of the relative degree of their fault, *held* replaced by a rule requiring liability for such damage to be allocated among the parties proportionately to the comparative degree of their fault, and to be allocated equally only when the parties are equally at fault or when it is not possible fairly to measure the comparative degree of their fault. Pp. 5–14.

497 F. 2d 1036, vacated and remanded.

STEWART, J., delivered the opinion for a unanimous Court.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 74–363

United States, Petitioner,
v.
Reliable Transfer Co., Inc.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[May 19, 1975]

MR. JUSTICE STEWART delivered the opinion of the Court.

More than a century ago, in *The Schooner Catherine* v. *Dickinson*, 58 U. S. (17 How.) 170, this Court established in our admiralty law the rule of divided damages. That rule, most commonly applied in cases of collision between two vessels, requires the equal division of property damage whenever both parties are found to be guilty of contributing fault, whatever the relative degree of their fault may have been. The courts of every major maritime nation except ours have long since abandoned that rule, and now assess damages in such cases on the basis of proportionate fault when such an allocation can reasonably be made. In the present case we are called upon to decide whether this country's admiralty rule of divided damages should be replaced by a rule requiring, when possible, the allocation of liability for damages in proportion to the relative fault of each party.

I

On a clear but windy December night in 1968, the *Mary A. Whalen*, a coastal tanker owned by the respondent Reliable Transfer Company, embarked from Constable Hook, New Jersey, for Island Park, New York, with a load of fuel oil. The voyage ended, instead,

with the vessel stranded on a sand bar off Rockaway Point outside New York harbor.

The *Whalen*'s course led across the mouth of the Rockaway Inlet, a narrow body of water that lies between a breakwater to the southeast and the shoreline of Coney Island to the northwest. The breakwater is ordinarily marked at its southernmost point by a flashing light maintained by the Coast Guard. As, however, the *Whalen*'s captain and a deckhand observed while the vessel was proceeding southwardly across the Inlet, the light was not operating that night. As the *Whalen* approached Rockaway Point about half an hour later, her captain attempted to pass a tug with a barge in tow ahead, but, after determining that he could not overtake them, decided to make a 180 degree turn to pass astern of the barge. At this time the tide was at flood, and the waves, whipped by northwest winds of gale force, were eight to ten feet high. After making the 180 degree turn and passing astern of the barge, the captain headed the *Whalen* eastwardly, believing that the vessel was then south of the breakwater and that he was heading her for the open sea. He was wrong. About a minute later the light structure on the southern point of the breakwater came into view. Turning to avoid rocks visible ahead, the *Whalen* ran aground in the sand.

The respondent brought this action against the United States in a federal district court, under the Suits in Admiralty Act, 46 U. S. C. § 741 *et seq.*, and the Federal Tort Claims Act, 28 U. S. C. § 1346 *et seq.*, seeking to recover for damages to the *Whalen* caused by the stranding. The District Court found that the vessel's grounding was caused 25% by the failure of the Coast Guard to maintain the breakwater light and 75% by the fault of the *Whalen*. In so finding on the issue of comparative fault, the court stated:

"The fault of the vessel was more egregious than

the fault of the Coast Guard. Attempting to negotiate a turn to the east, in the narrow space between the bell buoy No. 4 and the shoals off Rockaway Point, the Captain set his course without knowing where he was. Obviously, he would not have found the breakwater light looming directly ahead of him within a minute after his change of course, if he had not been north of the point where he believed he was.

"Equipped with look-out, chart, searchlight, radiotelephone, and radar, he made use of nothing except his own guesswork judgment. After . . . turning in a loop toward the north so as to pass astern of the tow, he should have made sure of his position before setting his new 73° course. The fact that a northwest gale blowing at 45 knots with eight to ten foot seas made it difficult to see, emphasizes the need for caution rather than excusing a turn into the unknown. . . ."

The court held, however, that the settled admiralty rule of divided damages required each party to bear one-half of the damages to the vessel.[1]

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[1] The operation of the rule was described in *The Sapphire*, 85 U. S. (18 Wall.), 51, 56:

"It is undoubtedly the rule in admiralty that where both vessels are in fault the sums representing the damage sustained by each must be added together and the aggregate divided between the two. This is in effect deducting the lesser from the greater and dividing the remainder. . . . . If one in fault has sustained no injury, it is liable for half the damages sustained by the other, though that other was also in fault."

Similarly, in *The North Star*, 106 U. S. 17, 22, the rule was thus stated:

"[A]ccording to the general maritime law, in cases of collision occurring by the fault of both parties, the entire damage to both ships is added together in one common mass and equally divided

The Court of Appeals for the Second Circuit affirmed this judgment. 497 F. 2d 1036. It held that the trial court "was not clearly erroneous in finding that the negligence of both parties, in the proportions stated, caused the stranding." *Id.*, at 1037–1038. And, although "mindful of the criticism of the equal division of damages rule and . . . recogniz[ing] the force of the argument that in this type of case division of damages in proportion to the degree of fault may be more equitable," *id.*, at 1038, the appellate court felt constrained to adhere to the established rule and "to leave doctrinal development to the Supreme Court or to await appropriate action by Congress." *Ibid.*

We granted certiorari, — U. S. —, to consider the continued validity of the divided damages rule.[2]

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between them, and thereupon arises a liability of one party to pay to the other such sum as is necessary to equalize the burden."

See also, *e. g.*, *White Oak Transportation Co.* v. *Boston, Cape Cod & New York Canal Co.*, 258 U. S. 341; *The Eugene F. Moran*, 212 U. S. 466.

It has long been settled that the divided damages rule applies not only in cases of collision between two vessels, but also in cases like this one where a vessel partly in fault is damaged in collision or grounding because of the mutual contributing fault of a nonvessel party. *Atlee* v. *Northwestern Union Packet Co.*, 88 U. S. (21 Wall.) 389 (barge struck pier because of mutual fault of barge and of pier owner); *White Oak Transportation Co.* v. *Boston, Cape Cod & New York Canal Co.*, 258 U. S. 341 (steamship ran aground in canal because of joint negligence of steamship and canal company). See also G. Gilmore & C. Black, The Law of Admiralty § 7–17, 522–523 (2d ed. 1975).

[2] The Government's petition for certiorari presented the single question whether the admiralty rule of equally divided damages should be replaced by the rule of damages in proportion to fault. The respondent did not file a cross-petition for certiorari, but it now argues that the Government was solely at fault and requests an increase of the judgment in its favor to the full amount of its damages. However, absent a cross-petition for certiorari, the respondent may not now challenge the judgment of the Court of Appeals to en-

II

The precise origins of the divided damages rule are shrouded in the mists of history.[3] In any event it was not until early in the 19th century that the divided damages rule as we know it emerged clearly in British admiralty law. In 1815, in *The Woodrop-Sims*, 2 Dods. 83, 165 Eng. Rep. 1422, Sir William Scott, later Lord Stowell, considered the various circumstances under which maritime collisions could occur and stated that division of damages was appropriate in those cases

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large its rights thereunder. *Morley* v. *Maryland Casualty Co.*, 300 U. S. 185, 190; *United States* v. *American Railway Express Co.*, 265 U. S. 425, 435. Moreover, even if it could be argued that respondent's challenge of the factual findings could be taken as an argument in support of the judgment, see Stern, When to Cross-Appeal or Cross-Petition—Certainty or Confusion?, 87 Harv. L. Rev. 763, 774 (1974), the findings of fact with respect to comparative negligence were concurred in by both the District Court and the Court of Appeals, and the respondent could not in this case meet its heavy burden under the "two-count rule." *Graver Mfg. Co.* v. *Linde*, 336 U. S. 271, 275. See *Berenyi* v. *Immigration Director*, 385 U. S. 630, 635.

[3] Most commentators have traced the rule back to Article XIV of the Laws of Oleron, promulgated in about 1150 A. D., which provided that in cases of collision between a ship under way and another at anchor, the damages would be divided equally between the owners of the two vessels, so long as the captain and crew of the ship under way swore under oath that the collision was accidental. See, *e. g.*, Marsden, 4 British Shipping Laws, Collisions at Sea § 119 (11th ed. 1961). See also Staring, Contribution and Division of Damages in Admiralty and Maritime Cases, 45 Calif. L. Rev. 304 (1957).

Other maritime nations enacted provisions similar to Article XIV during the same period, with slight variations in the scope of the rule and the principle of division. Marsden, *supra*, §§ 119–125. "The principle . . . underlying the rule seems to have been that collision was a peril of the sea—a common misfortune to be borne by all parties, either equally or ratably according to their interests at risk." *Id.*, § 140.

"where both parties are to blame." 2 Dods., at 85, 165 Eng. Rep., at 1423. In such cases the total damages were to be "apportioned between" the parties "as having been occasioned by the fault of both of them." *Ibid.* Nine years later the divided damages rule became settled in English admiralty law when the House of Lords in a maritime collision case where both ships were at fault reversed a decision of a Scottish court that had apportioned damages by degree of blame, and, relying on *The Woodrop-Sims*, ordered that the damages be divided equally. *Hay* v. *LeNeve*, 2 Shaw's Scotch App. Cas. 395 (1824).

It was against this background that in 1854 this Court adopted the rule of equal division of damages in *The Schooner Catherine* v. *Dickinson*, 58 U. S. (17 How.) 170. The rule was adopted because it was then the prevailing rule in England, because it had become the majority rule in the lower federal courts, and because it seemed the "most just and equitable, and . . . best [tended] to induce care and vigilance on both sides, in the navigation." *Id.*, at 177–178. There can be no question that subsequent history and experience have conspicuously eroded the rule's foundations.[4]

It was true at the time of *The Catharine* that the divided damages rule was well entrenched in English law.

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[4] The Court has acknowledged the continued existence of the divided damages rule in at least two recent cases. See *Weyerhaeuser S. S. Co.* v. *United States*, 372 U. S. 597, 603; *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U. S. 282, 284. But in neither case did the Court have occasion to re-examine the rule or to appraise the validity of its underpinnings or the propriety of its present application. The Court granted certiorari in *Union Oil Co. of California* v. *The San Jacinto*, 409 U. S. 140, to reconsider the divided damages rule, but did not reach the issue because of our conclusion that one of the vessels involved in that case was totally free of contributing fault.

The rule was an ancient form of rough justice, a means of apportioning damages where it was difficult to measure which party was more at fault. See 4 Marsden, British Shipping Laws, Collisions At Sea, §§ 119–147 (11th ed., 1961); Staring, Contribution and Division of Damages in Admiralty and Maritime Cases, 45 Calif. L. Rev. 304, 305–310 (1957). But England has long since abandoned the rule [5] and now follows the Brussels Collision Liability Convention of 1910 that provides for the apportionment of damages on the basis of "degree" of fault whenever it is possible to do so.[6] Indeed, the United States is now virtually alone among the world's major maritime nations in not adhering to the Convention with its rule of proportional fault [7]—a fact that encourages transoceanic forum shopping. See G. Gilmore & C. Black, The Law of Admiralty 529 (2d ed. 1975).

While the lower federal courts originally adhered to the divided damages rule, they have more recently fol-

[5] Maritime Conventions Act, 1911, 1 & 2 Geo. 5, c. 57, § 1.

[6] Article 4 of the Convention provides in part: "If two or more vessels are in fault the liability of each vessel shall be in proportion to the degree of the faults respectively committed. Provided that if, having regard to all the circumstances, it is not possible to establish the degree of the respective faults, or if it appears that the faults are equal, the liability shall be apportioned equally."

[7] We are informed by the Government that the following jurisdictions have ratified or adhere to the Brussels Convention on Collision Liability: Argentina, Australia, Austria, Belgium, Brazil, Canada, Danzig, Denmark, Egypt, Estonia, Finland, France, Germany, Great Britain, Greece, Haiti, Hungary, Iceland, India, Ireland, Italy, Japan, Latvia, Mexico, Newfoundland, New Zealand, Netherlands, Nicaragua, Norway, Poland, Portugal, Romania, U. S. S. R., Sweden, Switzerland, Turkey, Uruguay, and Yugoslavia. See 6 Knauth's Benedict on Admiralty (7th ed. 1969), at 38–39. See also J. Griffin, The American Law of Collision 857 (1949); Staring, Contribution and Division of Damages in Admiralty and Maritime Cases, 45 Calif. L. Rev. 304, 340–341 (1957); *Tank Barge Hygrade* v. *The Gatco NJ*, 250 F. 2d 485, 488 (CA3).

lowed it only grudgingly, terming it "unfair," [8] "illogical.," [9] "arbitrary . . . archaic and frequently unjust." [10] Judge Learned Hand was a particularly stern critic of the rule. Dissenting in *National Bulk Carriers, Inc.* v. *United States*, 183 F. 2d 405, 410 (CA2), he wrote: "An equal division [of damages] in this case would be plainly unjust; they ought to be divided in some such proportion as five to one. And so they could be but for our obstinate cleaving to the ancient rule which has been abrogated by nearly all civilized nations." And Judge Hand had all but invited this Court to overturn the rule when, in an earlier opinion for the Second Circuit Court of Appeals, he stated that "we have no power to divest ourselves of this vestigial relic; we can only go so far to close our eyes to doubtful delinquencies." *Oriental Trading & Transp. Co.* v. *Gulf Oil Corp.*, 173 F. 2d 108, 111. Some courts, even bolder, have simply ignored the rule. See J. Griffin, The American Law of Collision, 564 (1949); Staring, Contribution and Division of Damages in Admiralty and Maritime Cases, 45 Calif. L. Rev. 304, 341–342 (1957). Cf. *The Margaret*, 30 F. 2d 923 (CA3).

It is no longer apparent, if it ever was, that this solomonic division of damages serves to achieve even rough justice.[11] An equal division of damages is a reasonably

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[8] *Ahlgren* v. *Red Star Towing and Transp. Co.*, 214 F. 2d 618, 620 (CA2).

[9] *Marine Fuel Transfer Corp.* v. *The Ruth*, 231 F. 2d 319, 321 (CA2).

[10] *Tank Barge Hygrade* v. *The Gatco NJ*, 250 F. 2d 485, 488 (CA3). See also *Mystic S. S. Corp.* v. *M/S Antonio Ferraz*, 498 F. 2d 538, 539 n. 1 (CA2); *Petition of Oskar Tiedemann and Co.*, 289 F. 2d 237, 241–242 (CA3); *In re Adams' Petition*, 237 F. 2d 884, 887 (CA2); *Luckenbach S. S. Co.* v. *United States*, 157 F. 2d 250, 252 (CA2).

[11] It is difficult to imagine any manner in which the divided damages rule would be more likely to "induce care and vigilance" than a

satisfactory result only where each vessel's fault is approximately equal and each vessel thus assumes a share of the collision damages in proportion to its share of the blame, or where proportionate degrees of fault cannot be measured and determined on a rational basis. The rule produces palpably unfair results in every other case. For example, where one ship's fault in causing a collision is relatively slight and her damages small, and where the second ship is grossly negligent and suffers extensive damage, the first ship must still make a substantial payment to the second. "This result hardly commends itself to the sense of justice any more appealingly than does the common law doctrine of contributory negligence . . . ." G. Gilmore & C. Black, The Law of Admiralty 528 (2d ed. 1975).

And the potential unfairness of the division is magnified by the application of the rule of *The Pennsylvania*, 86 U. S. (19 Wall.) 125, whereby a ship's relatively minor statutory violation will require her to bear half the collision damage unless she can satisfy the heavy burden of showing "not merely that her fault might not have been one of the causes, or that it probably was not, but that it *could not have been.*" *Id.*, at 136 (emphasis added). See *O/Y Finlayson-Forssa A/B* v. *Pan Atlantic S. S. Co.*, 259 F. 2d 11, 22; *In The New York Marine No. 10*, 109 F. 2d 564, 566 (CA2). See also Griffin, The American Law of Collisions § 202 (1949).

The Court has long implicitly recognized the patent harshness of an equal division of damages in the face of disparate blame by applying the "major-minor" fault

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comparative negligence rule that also penalizes wrongdoing, but in proportion to measure of fault. A rule that divides damages by degree of fault would seem better designed to induce care than the rule of equally divided damages, because it imposes the strongest deterrent upon the wrongful behavior that is most likely to harm others.